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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 119

SAMUEL REISMAN, ET AL., PETITIONERS

v.

HON. MORTIMER M. CAPLIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT CAPLIN

OPINIONS BELOW

The findings of fact, conclusions of law, and order of the district court denying the motion for a preliminary injunction and dismissing petitioners' complaint (R. 145–150), are not officially reported. The opinion of the court of appeals (R. 156–161) is reported at 317 F. 2d 123.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 1963 (R. 162). The petition for a writ of certiorari was filed on May 8, 1963, and was granted on June 17, 1963 (R. 163; 374 U.S. 825). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The Internal Revenue Code establishes a comprehensive procedure for the issuance of summonses in aid of the determination or collection of any tax liability and for the enforcement of such summonses by the courts. The questions presented are:

1. Whether petitioners' complaint, which sought to enjoin the Commissioner of Internal Revenue from attempting to enforce certain summonses by court action, constituted a suit against the United States without its consent.

2. Whether petitioners have an adequate remedy at law by way of defense to the Commissioner's enforcement action so that their injunction suit, if not barred by sovereign immunity, is subject to dismissal for want of equity.

STATUTES INVOLVED

Sections 7210, 7402, 7421, 7602 and 7604 of the Internal Revenue Code of 1954 and Sections 1340 and 2201 of 28 U.S.C. are set out in the Appendix, *infra*, pp. 55–58.

STATEMENT

On July 7, 1961, petitioners filed a complaint in the United States District Court for the District of Columbia asking declaratory and injunctive relief against respondent Caplin, the Commissioner of Internal Revenue (R. 2–16), and against the respondent accounting firm, Peat, Marwick, Mitchell & Company. The allegations of the complaint may be summarized as follows:

In April 1960, petitioner Reisman, an attorney who has represented a taxpayer named Bromley for over ten years, retained the other three petitioners as associate counsel in connection with Bromley's tax problems (R. 2–5). In preparing for the trial of Tax Court cases involving Bromley's income tax liabilities for the years 1953 to 1956, and also in view of possible criminal prosecution, petitioners decided that they needed skilled accounting advice and engaged respondent Peat-Marwick (R. 3–4, 5, 118). Thereafter, under the supervision of petitioners, Peat-Marwick analyzed various original records of Bromley and his corporations, and periodically reviewed its findings and tabulations with petitioners (R. 5, 45–46). Pursuant to petitioners' instructions, the accounting firm segregated and labelled all products of their joint work with petitioners, together with Bromley's original records, as the property of petitioners in which the accounting firm claimed no property rights (R. 6, 44–45).

After being informed by an Internal Revenue Service official that no criminal action was contemplated against Bromley, petitioners tentatively agreed to make some of the records and accounting information available to the Service for the purpose of settling the Tax Court cases (R. 6). Thereafter, at a conference attended by Bromley and petitioners, Revenue officials warned that a criminal investigation against Bromley was pending, and Bromley refused to make his papers available and refused to waive his constitutional rights (R. 6–7, 46).

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Some three weeks later, on June 13, 1961, respondent Caplin caused summonses to be served upon the Los Angeles, Chicago and New York offices of Peat-Marwick, directing the firm to appear at a stated time and place and testify as to the tax liability of Bromley for the years 1957–1959, and as to the tax liability of Service Games, Inc.—Panama, for the years 1953–1959 (R. 7–8, 19–40). The summonses also directed the firm to produce "all audit reports, work papers and correspondence" in its custody pertaining to Bromley and certain named partnerships for the years 1957–1959, and "All books, documents and records" in its custody pertaining to named corporations for the pertinent years (R. 19–40). The summonses stated that failure to comply "will render you liable to proceedings in the district court of the United States or before a United States Commissioner to enforce obedience to the requirements of this summons, and to punish default or disobedience" (*e.g.*, R. 20). Petitioners were informed that Peat-Marwick would "attempt to comply" with the summonses unless enjoined (R. 10).

Upon the basis of the foregoing allegations, the complaint concluded that enforcement of the summonses would be an unreasonable seizure, could force Bromley to incriminate himself, and would deprive Bromley of effective assistance of counsel by revealing to the government the preparations his counsel had made for the Tax Court cases (R. 8–10, 46). The complaint asked the court to declare the summonses null and void, and to issue a temporary restraining order and permanent injunction enjoining respondent

Caplin (and his agents and successors in office) from attempting to enforce the summonses by court action, and enjoining the respondents Harney and MacClure (as representatives of Peat-Marwick) from testifying or from producing records in response to the summonses (R. 10–15).

With the complaint, petitioners filed a motion for a temporary restraining order and a preliminary injunction supported by an affidavit of petitioner Nathan alleging that Peat-Marwick had been engaged solely to assist petitioners in preparation for trial of the Tax Court actions; that Peat-Marwick had agreed that all records, papers and work sheets involved should remain the property of petitioners; and that Peat-Marwick would comply with the summonses unless enjoined, "so as not to risk attachment for contempt" for disobedience to the summonses (R. 41–47). The district court granted the temporary restraining order (R. 53–57).

Respondent Caplin moved to dismiss the complaint on the grounds (1) that petitioners had no standing to sue; (2) that the district court had no jurisdiction to enjoin the assessment and collection of a federal tax; (3) that declaratory relief with respect to federal taxes is specifically prohibited by statute; and (4) that the complaint failed to state a cause of action (R. 58, 71).

The respondents Harney and MacClure, as representatives of Peat-Marwick, filed an answer (R. 107–111) which admitted the essential allegations of the complaint, except for the allegation that they would voluntarily comply with the summonses. As to this,

they admitted "that if the mentioned Summonses are complied with and will have to be complied with, that they will be called upon to deliver up * * * work-papers, records and documents belonging to [petitioners] * * * and this could compromise trial preparations" in the Tax Court cases (R. 110). They joined in the prayer for relief of petitioners' complaint (R. 110–111).

The district court, upon consideration of the pleadings, interrogatories, and argument (R. 64–70, 102–107, 112–145), found that petitioners had hired Peat-Marwick to examine the books of Bromley, his corporations and his partnerships in connection with his tax liabilities; that Peat-Marwick had examined various original books and records and had prepared work papers and audit reports; that all the work on the work papers and audit reports sought by the summonses had been performed by Peat-Marwick; and that the summonses required nothing of petitioners. The court concluded that petitioners had no standing to sue; that they had failed to state a cause of action; that the original books and records were not the work product of petitioners; that the work papers and audit reports were the work product of Peat-Marwick; and that none of the documents sought by the summonses fell within the attorney-client privilege (R. 145–149). Petitioners' motion for preliminary injunction was denied, and the government's motion to dismiss the complaint was granted (R. 149–150).

The court of appeals affirmed the dismissal of the complaint on the ground that the suit was in substance one against the United States to which it

had not consented, and was therefore prohibited under the doctrine of sovereign immunity (R. 156–161). While recognising the right to sue an officer of the United States as an individual where the acts complained of are beyond the scope of his statutory authority, the court held that Section 7602 of the Internal Revenue Code, pursuant to which the instant summonses were issued, "clearly authorizes" the Commissioner to proceed as he did in this case (R. 159). The court concluded (R. 159–160):

> [I]n this case the Commissioner does not appear as yet to have departed from his statutory authority, to say nothing of having so departed as to justify interpreting the suit to be one against him personally, rather than in substance and effect against the United States. In so viewing the matter we have in mind that the effort is to stop the United States, acting through the Commissioner, his successors and agents, from initiating further steps to obtain documents which the persons summoned cannot be compelled to produce unless and until enforcement proceedings are pursued.

Since the filing of the complaint, the Tax Court cases have been tried and are now awaiting decision (Pet. Br. 38).[1]

SUMMARY OF ARGUMENT

Petitioners, claiming that summonses issued by the Commissioner of Internal Revenue are invalid and that compliance would violate their constitutional rights and those of their client, sued to enjoin enforcement of the summonses and for a declaration

[1] See footnotes 21, 29, *infra*.

that they are null and void. The Internal Revenue Code constitutionally authorizes the issuance and enforcement of such summonses in aid of the determination or collection of a tax liability. These statutory procedures afford persons summoned and interested third parties such as petitioners a full opportunity to test the validity of the summonses and to assert their constitutional rights. Under the circumstances, petitioners' action was properly dismissed as a suit against the United States without its consent and, wholly apart from the doctrine of sovereign immunity, because petitioners have an adequate remedy at law.

A. The Internal Revenue Code establishes a comprehensive scheme for the issuance and judicial enforcement of summonses by the Commissioner. The Code authorizes the Commissioner to issue summonses for the purpose of determining or collecting any tax liability. Under orderly procedures established by the Code, persons summoned and interested third parties may raise objections to the validity of the summonses and assert their constitutional rights in administrative proceedings before a Special Agent. If the Commissioner wishes to enforce compliance, he must proceed before a federal district court or a United States Commissioner who will hold a hearing and, if the defenses are found unmeritorious, may order compliance and commit the witness until he complies. Such an order is immediately appealable.

The Code also provides that a person who "neglects to appear or to produce" in compliance with a summons may be subject to criminal prosecution. This provision applies only where there is a wilful "neglect" and is avoided by one who appears and claims defenses as grounds for noncompliance. Thus, the Code neither forecloses defenses nor compels any person to risk punishment in order to test his rights and the validity of the summons.

The comprehensive nature of these statutory provisions for issuance and enforcement of summonses indicates that Congress intended them to be the sole means for obtaining judicial review.

B. There is no basis for a claim that the Code provision for the issuance of summonses is unconstitutional. Nor may it be contended that the provisions for enforcement of summonses are unconstitutional on the ground that the penalties risked by a refusal to comply are so severe that requiring taxpayers or witnesses to observe the statutory procedures amounts to a denial of judicial review. In *Ex parte Young*, 209 U.S. 123, in which the Court enunciated the latter principle, the penalties for noncompliance with rate regulations were imprisonment without regard to wilfulness and the daily accrual of enormous fines. No such penalties are imposed by the Code and indeed a simple appearance and assertion of defenses before the Special Agent avoids any risk of punishment.

C. It is neither contrary to the Code nor unconstitutional to apply the statutory provisions for enforcement to summonses addressed to Peat-Marwick

for documents which allegedly belong to petitioners or their client. In the first place, it is doubtful that Peat-Marwick has any rights to refuse to comply—the rights described in this action being those of third parties—but such rights as it may have may all be tested administratively and then in the courts under the procedures set up by the Code. In the same way, petitioners may test their asserted rights—if any—to prevent compliance by Peat-Marwick with the summonses.

The possibility that Peat-Marwick might voluntarily turn over the documents before the return date of the summonses does not give petitioners or their client a constitutional ground for avoiding the statutory process for review. First, the pleadings show no real threat of such an action by Peat-Marwick. Second, the possibility of a voluntary disclosure, if it does exist, is merely the usual risk assumed by one who turns his documents over to a third party. Finally, petitioners or their client may protect their rights by an action to compel Peat-Marwick to respect those rights pending a judicial order in enforcement proceedings brought by the Commissioner.

II

Since the Commissioner acted within his statutory and constitutional authority, this action to circumvent the statutory procedures for review should be dismissed as a suit against the United States without its consent.

A. It is part of the Commissioner's official duty to issue and enforce summonses. His performance of

this duty is an action of the United States. The relief sought by petitioners would interfere with this action. It is therefore a suit against the United States without its consent, barred by the doctrine of sovereign immunity.

B. This suit does not fall within either of the recognized exceptions of the doctrine of sovereign immunity, *i.e.*, that a suit against a government official becomes one against him as an individual if (1) the official exceeds his statutory authority, or (2) that authority or its exercise is constitutionally void. As to the first exception, petitioners argue that the Commissioner desired the documents for unauthorized purposes: for use in connection with litigation pending in the Tax Court against their client Bromley and as evidence for use in a possible criminal prosecution against him. Even if petitioners were right as to the Commissioner's purposes and authority, this would only establish that the Commissioner had made "an incorrect decision as to law." *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 695. The Commissioner's power is to decide when to issue and not to issue summonses and his error in determining the extent of that power would not avoid the bar of sovereign immunity.

Nor is there any basis for bringing this case within the second exception of the doctrine of sovereign immunity. As noted, neither the Commissioner's powers to issue and enforce summonses nor their exercise here is unconstitutional. The statutory procedures for administrative and judicial review offer a complete opportunity for interested persons to seek

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correction of any error of the Commissioner in issuing the summonses and to vindicate any possible constitutional rights to avoid compliance.

C. Invocation of the doctrine of sovereign immunity in this case serves the most practical considerations of tax administration and results in no injustice. The question is not whether petitioners, their client or Peat-Marwick should be compelled to turn over documents without an opportunity to obtain judicial review of their claims that the summonses are invalid and that production would violate their constitutional rights. Rather, the question is whether petitioners may avoid the orderly procedures established by the Code for such review and stop the administration of the revenue laws in its tracks.

To permit this action to be maintained could lead to a multiplicity of litigation. Since petitioners' suit was commenced before there had been an opportunity for the Commissioner to pose particular questions or request the production of specific documents, a decision in his favor here might not finally determine all issues with respect to the summonses. If Peat-Marwick thereafter should refuse to comply, the Commissioner would then have to institute enforcement proceedings in the district court. The additional litigation, which might entail a substantial and unnecessary delay in the collection of the revenue, will be avoided if persons summoned are required to assert their defenses in orderly fashion first before the Service and, should they be rejected, in the ensuing enforcement proceedings.

III

Petitioners have failed to demonstrate that they are entitled to injunctive relief, the basis of which has always been the threat of irreparable harm and the lack of an adequate remedy at law. That petitioners have such a remedy is clear since the same defenses and privileges which they assert in this action may be raised by them before the Special Agent and in any future judicial action by the Commissioner for enforcement. Petitioners seek to justify their resort to equity by the allegation that an advance determination is necessary because Peat-Marwick would have complied with the summonses unless enjoined by court action. However, the pleadings appear to refute the allegation and, in any event, do not establish a clear risk of irreparable harm warranting intervention by a court of equity. Further, petitioners could have adequately protected their rights simply by bringing an action against Peat-Marwick to enjoin compliance until ordered to do so in enforcement proceedings brought by the Commissioner.

Nor is there merit to petitioners' remaining allegation that equity should act at their behest to protect Peat-Marwick from the risks of arrest or criminal prosecution entailed by disobedience of the summonses. Since petitioners themselves face no such risks, they have no standing to invoke the aid of equity. Moreover, even if petitioners were entitled to assert Peat-Marwick's rights as grounds for equitable relief, there would be no basis for the court to

act. Thus, it is clear that Peat-Marwick may effectively eliminate any risk of arrest or criminal prosecution simply by appearing in response to the summonses and claiming any privileges at that time. Even if it be conceded that the possibility of criminal prosecution could arise under certain circumstances, it is well established that a court of equity will not intervene to enjoin enforcement of a criminal statute where the penalties for disobedience (as here) are not such as to result in severe financial loss by way of cumulative penalties or otherwise.

IV

If this Court were to hold that the action is maintainable, we agree with petitioners that it should remand the cause to the district court for a hearing on the merits of their complaint for a permanent injunction.

ARGUMENT

INTRODUCTION

Petitioners, tax attorneys for one Bromley, sued to enjoin the Commissioner of Internal Revenue from enforcing by court action summonses served upon their accountants, Peat-Marwick, and in the alternative, asked that the summonses be declared void (R. 10–15). They contend that the Commissioner exceeded his statutory authority in issuing the summonses and that their enforcement would violate their rights and privileges under the Constitution and the common law, and also the rights of their client. They

also argue that they could not, without irreparable injury, await the statutory enforcement proceedings for a determination of these issues because their accountants will comply with the summons and, in any event, could not be expected to risk the criminal penalties prescribed for disobedience.

Our answer is that the Internal Revenue Code not only authorizes the Commissioner to issue summonses in aid of the determination or collection of a tax liability, but also provides an exclusive forum for challenging the correctness of his action or asserting any constitutional or other legal privileges of withholding the documents sought. Since the statutory procedure fully protects any rights of the person summoned, it meets all the requirements of the Constitution. Under these circumstances, petitioners' action is plainly a suit to enjoin the Commissioner's performance of his official duty to administer the revenue laws and is therefore barred by the doctrine of sovereign immunity as a suit against the United States without its consent. Wholly apart from the government's sovereign immunity, since petitioners have an adequate remedy at law in the enforcement proceedings and since they may take judicial action to avoid any possibility that Peat-Marwick will comply with the summonses in advance of such proceedings, the action would have to be dismissed for want of equity jurisdiction.

I

THE INTERNAL REVENUE CODE CONSTITUTIONALLY AUTHORIZES THE ISSUANCE OF ADMINISTRATIVE SUMMONSES IN AID OF THE DETERMINATION OR COLLECTION OF A TAX LIABILITY AND PROVIDES AN ADEQUATE AND EXCLUSIVE FORUM IN WHICH ANY PERSON AFFECTED MAY CHALLENGE THE VALIDITY OF THE SUMMONSES AND ASSERT ANY CONSTITUTIONAL RIGHTS

A. *The Code establishes a comprehensive scheme for the issuance of summonses by the Commissioner and a judicial test of their validity and constitutionality*

Section 7602 of the Internal Revenue Code of 1954 authorizes the Commissioner of Internal Revenue to summon any person to appear and produce books or records and give testimony "[f]or the purpose of ascertaining the correctness of any return, * * * determining the liability of any person for any internal revenue tax * * *, or collecting any such liability * * *." The Code also provides an orderly and adequate means by which persons affected may challenge the validity of the summons and assert any constitutional rights they may have to refuse or prevent compliance. Thus, the person is summoned "to appear before the Secretary or his delegate at a time and place named in the summons" (Section 7602(2)). On that occasion, the person may raise any objections he may have to the production of requested documents or to questions posed. Interested third parties may also appear and assert their rights to nondisclosure of documents or information.[2]

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[2] *Foster* v. *United States*, 265 F. 2d 183, 185 (C.A. 2), certiorari denied, 360 U.S. 912; *In re Albert Lindley Lee Memorial Hospital*, 209 F. 2d 122, 123 (C.A. 2), certiorari denied *sub nom. Cincotta* v. *United States*, 347 U.S. 960; *Corbin*

If the defenses raised to the summons are rejected by the Commissioner, the Code assures the person summoned a judicial test of his asserted rights by requiring the Commissioner to move for enforcement in a federal district court or before a United States Commissioner (Sections 7402(b), 7604(a) and 7604 (b), App., *infra*, pp. 55, 56–57). The Code gives the Commissioner of Internal Revenue no authority to enforce compliance or impose sanctions for noncompliance in administrative proceedings.

Specifically, Sections 7402(b) and 7604(a) grant to the federal district courts "jurisdiction by appropriate process" to compel compliance with a summons.[3] To invoke this jurisdiction the Commissioner generally proceeds by an application for an order to show cause why the person summoned should not be ordered to comply[4] or by a simple application for an order directing compliance.[5] Alternatively, Section 7604(b)

Deposit Bank of Corbin v. *United States*, 244 F. 2d 177 (C.A. 6); *In re Magnus, Mabee & Reynard, Inc.*, 311 F. 2d 12, 18 (C.A. 2) (concurring opinion), certiorari denied, 370 U.S. 918; Rule 24, Federal Rules of Civil Procedure.

[3] The Commissioner may also proceed under Section 7402(a) which grants to the district courts, "at the instance of the United States," the power "to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws." See *Brody* v. *United States*, 243 F. 2d 378, 384 (C.A. 1), certiorari denied, 354 U.S. 923.

[4] See, *e.g.*, *Peoples Deposit Bank & Trust Co.* v. *United States*, 212 F. 2d 86 (C.A. 6), certiorari denied, 348 U.S. 838; *Beatty* v. *United States*, 227 F. 2d 350 (C.A. 8); *Boren* v. *Tucker*, 239 F. 2d 767 (C.A. 9).

[5] See, *e.g.*, *O'Connor* v. *O'Connell*, 253 F. 2d 365 (C.A. 1); *Falsone* v. *United States*, 205 F. 2d 734 (C.A. 5), certiorari denied, 346 U.S. 864.

(App., *infra*, p. 57) provides that upon a failure or refusal to comply, the Commissioner may apply to the district court or to a United States Commissioner for an attachment against the summoned person "as for a contempt" and "if satisfactory proof is made," the district judge or the Commissioner may order the "arrest of such person and upon his being brought before him to proceed to a hearing of the case * * *."*

Following the hearing which is required whether the Commissioner proceeds by way of Section 7402(b), 7604(a) or 7604(b), the judge or the United States Commissioner, if he finds the defenses unmeritorious, may issue an order for compliance with the summons. In addition, under Section 7604(b), which authorizes the court or the United States Commissioner "to make such order as he shall deem proper, not inconsistent

*The legislative history of the provision, first passed in 1864 (13 Stat. 226), indicates that Congress was greatly concerned about the delays which occurred in the collection of taxes. 65 Cong. Globe 2440-2441. By authorizing the Commissioner to apply for an "attachment * * * as for a contempt," the Congressional sponsors of the bill stated that it was their intention to provide for a summary and effective means (thereby minimizing delays) by which the court could acquire jurisdiction over the person summoned (*ibid.*). The provision which required "satisfactory proof be made" before the court could issue an attachment was deemed sufficient to protect the rights of the summoned person from administrative abuse. 65 Cong. Globe 2660-2661. Moreover, it was emphasized by the proponents of the bill that after an attachment was issued, the witness could assert his objections and privileges at the hearing before the court, who could then rule and make such order "as he shall deem proper." 66 Cong. Globe 2997. The proceeding by way of attachment was the only means of enforcement authorized until 1913, at which time Congress passed the predecessor of present Section 7604(a) (38 Stat. 179).

with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience," the witness may be ordered committed until such time as he complies with the summons. *McCrone* v. *United States*, 307 U.S. 61. It is clear, of course, that under "the law for the punishment of contempts" punishment for criminal contempt could be imposed only if the witness failed to obey the court order for compliance with the summons. *Brody* v. *United States*, *supra*.[7]

In the judicial enforcement proceedings, the person summoned may challenge the summons on any ground, including those urged here by petitioners—that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution (see, *e.g.*, *Boren* v. *Tucker*, 239 F. 2d 767, 772–773 (C.A. 9); *Lash* v. *Nighosian*, 273 F. 2d 185, 187–188 (C.A. 1), certiorari denied, 362 U.S. 904), and is protected by the attorney-client privilege. *Sale* v. *United States*, 238 F. 2d 682 (C.A. 8), certiorari denied, 350 U.S. 1006; *Bouschor* v. *United States*, 316 F. 2d 451 (C.A.

[7] In *Brody* (243 F. 2d at 381), the First Circuit stated: "Though this petition is entitled 'Petition for Attachment as for Contempt' and though a similar phrase is contained in § 7604(b), the proceeding was not strictly one of contempt, but was more accurately a proceeding to obtain the assistance of the court in forcing Brody to give the desired information to the Internal Revenue Service by the device of having the court issue an order to that effect, disobedience of which would be a contempt punishable by the court. * * * Brody could not have been punished summarily by the court for a contempt of court for his failure to obey the summons of the Internal Revenue Service."

8); *Chapman* v. *Goodman*, 219 F. 2d 802 (C.A. 9); *Commissioner* v. *Schwarz*, 247 F. 2d 70 (C.A. D.C.). The person summoned may, of course, also urge that enforcement of the summons would violate his constitutional rights, such as by compelling him to incriminate himself or subjecting him to an unreasonable search and seizure.[8] Finally, third persons who claim that enforcement of the summons would violate their rights, such as the owners of property who want to prevent its custodian from turning it over to the Commissioner, may intervene and fully present their claims to the court before the latter decides whether to order enforcement.

If the court or commissioner orders compliance, the person summoned—or an intervening third party—may obtain an appellate test of that order without risk of punishment for contempt. With the exception of the Seventh Circuit (*Application of Davis*, 303 F. 2d 601, certiorari granted, 371 U.S. 810, vacated as moot in 374 U.S. 495; *Jarecki* v. *Whetstone*, 192 F. 2d 121, 124), appellate courts have uniformly held that such an order is "final" and appealable since it marks the end of a proceeding begun against the witness. *O'Connor* v. *O'Connell*, 253 F. 2d 365–367 (C.A. 1); *In re Albert Lindley Lee Memorial Hospital*, 209 F. 2d 122, 123 (C.A. 2), certiorari denied, 347 U.S. 960; *Falsone* v. *United States*, 205 F. 2d 734, 737 (C.A. 5), certiorari denied, 346 U.S. 864; *Bouschor* v. *United States*, 316 F. 2d 451,

[8] *Bouschor* v. *United States*, 316 F. 2d 451, 457–459 (C.A. 8); *In re Turner*, 309 F. 2d 69 (C.A. 2); *Hubner* v. *Tucker*, 245 F. 2d 35 (C.A. 9).

454–455 (C.A. 8); *Martin v. Chandis Securities Co.*, 128 F. 2d 731, 734 (C.A. 9); *D. I. Operating Co.* v. *United States*, 321 F. 2d 586 (C.A. 9), decided August 22, 1963. Thus, with a stay of the order, the person summoned may have an appellate test of his rights before deciding whether to comply.

In addition to these proceedings for enforcement, a person who fails to comply with a summons may be subjected to criminal prosecution under Section 7210 (App., *infra*, p. 55) which provides as follows:

> Any person who, being duly summoned to appear to testify, or to appear and produce books, accounts, records, memoranda, or other papers, as required under sections * * * 7602, 7603, and 7604(b), neglects to appear or to produce such books, accounts, records, memoranda, or other papers, shall, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with costs of prosecution.

Although this section literally authorizes punishment upon conviction for mere neglect "to appear or to produce" in response to a summons, it is clear—from the only reported prosecution under this section or its predecessors—that wilfulness is an essential element of the offense. *United States* v. *Becker*, 259 F. 2d 869 (C.A. 2), certiorari denied, 358 U.S. 929.*

* The facts of this case show that Becker acted in outrageously bad faith in refusing to comply with the summons. He appeared in response to the summons and told the Service that the records called for had been destroyed. He was prosecuted only when he produced these same records, a year later, in response to a grand jury subpoena. See *United States* v. *Becker*, 58–1 U.S.T.C. par. 9403 (not officially reported).

There, the district court (58-1 U.S.T.C. at p. 68064)—

> construe[d] this word "neglect" as meaning something more than inadvertence. To make it a criminal offense to neglect in this situation would imply that he must have wilfully failed to comply with the summons with knowledge that a reasonable man should have had that he was failing to do what the summons requested him to do.

In our view, the requirement of wilfulness renders the section inapplicable to persons who appear on the return day of the summons and in good faith claim defenses as grounds for noncompliance even though those defenses may be held unmeritorious in later enforcement proceedings. Thus, if Peat-Marwick should appear in response to the summonses and decline to produce on grounds now being advanced by the petitioners, it would avoid any risk of prosecution under Section 7210. In short, a prosecution under this section, as noted by the court below, "would not follow from a good faith refusal to comply with a revenue summons" (R. 161). Of course, if a prosecution is brought, the person summoned may avoid conviction—whether or not he appeared on the return day—by showing that the summons was invalid or that compliance would have violated his constitutional rights. In sum, Section 7210 neither forecloses defenses nor compels any person to risk punishment in order to assert that the testimony or documents may not be required.

Thus, the Code not only gives the Commissioner authority to decide when to issue summonses but it also provides an orderly means of testing whether that authority has been properly exercised and whether persons affected have any constitutional right to withhold the evidence. The comprehensive nature of the statutory provisions by which Congress has provided for such a test indicates that it intended this to be the exclusive means for obtaining judicial review. There are no other provisions in the Code nor any indications in its legislative history to suggest that the Congress intended to recognize or allow any alternative means of obtaining such a test.[10] It is, of course, a familiar principle of statutory construction that where Congress has specified one remedy, this normally excludes any other. *United States* v. *Babcock*, 250 U.S. 328, 331. Further, as we shall show (*infra*, pp. 38–42), the delay and disruption of the public administration of the revenue laws incident to a suit to quash a summons are persuasive reasons why Congress excluded such procedures.

[10] We note, moreover, that solicitude for the prompt and orderly collection of the revenue has prompted Congress to curtail severely judicial intervention in tax proceedings. The Declaratory Judgment Act (28 U.S.C. 2201, Appendix, *infra*, p. 58), empowers the district courts to declare rights and other legal relations of interested parties "except with respect to Federal taxes." And Section 7421(a) of the Internal Revenue Code of 1954 (Appendix, *infra*, p. 55), with exceptions here pertinent only in that they demonstrate the stringent limitations of Congressional consent to suits against the United States in tax matters, provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 7–8.

B. The Code provisions authorizing the issuance and enforcement of revenue summonses and requiring all defenses to be set up under the statutory procedure are constitutional

Petitioners do not claim, and indeed we can conceive of no basis for a claim, that the Code provision pursuant to which the Commissioner issued the summonses is unconstitutional.

Turning to the enforcement provisions, the only possible basis for an attack upon their constitutionality would be the argument that the penalties risked by a refusal to comply with a summons are so severe that requiring taxpayers or witnesses to observe the statutory procedure amounts to a denial of judicial review and an attempt to make the decision of the Commissioner conclusive. *Ex parte Young*, 209 U.S. 123; *Oklahoma Operating Co.* v. *Love*, 252 U.S. 331; see *St. Regis Paper Co.* v. *United States*, 368 U.S. 208.[11] The Court invoked the latter principle in *Young* and *Oklahoma Operating Co.*, which involved the issuance of rate regulations by State agencies under statutes which imposed severe penalties for noncompliance. Finding that if the parties concerned had waited for the State Attorney General to move for compliance before asserting their objections, they would have been subject to possible imprisonment (without regard to the element of wilfulness) and

[11] The liability to "ruinous" penalties explains the Court's ruling in *St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 226, that a person ordered by the Federal Trade Commission to file special reports pursuant to Section 6(b) of the Federal Trade Commission Act, 15 U.S.C. 46(b), may seek a judicial test of the order without awaiting the initiation of enforcement and penalty proceedings by the Attorney General.

would have risked the daily accrual of enormous fines, the Court held the enforcement provisions to be unconstitutional on the ground that the enterprises affected must be given a chance to test the validity of the regulations prior to incurring such risks. It stated (*Ex parte Young*, 209 U.S. at 147):

> * * * If the law be such as to make the decision of the legislature or of a commission conclusive as to the sufficiency of the rates, this court has held such a law to be unconstitutional. *Chicago &c. Railway Co.* v. *Minnesota*, 134 U.S. 418. A law which indirectly accomplishes a like result by imposing such conditions upon the right to appeal for judicial relief as works an abandonment of the right rather than face the conditions upon which it is offered or may be obtained, is also unconstitutional. It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.

The enforcement provisions of the Internal Revenue Code impose no such risks as a condition to a judicial test. Indeed, in our view, a person summoned who appears and in good faith claims his rights as grounds for noncompliance runs no risks of punishment whatever, even though the defense is unsound. The Commissioner has no power in administrative proceedings to punish a refusal to comply. True, there is a risk of "arrest" if the Commissioner pro-

ceeds for enforcement of a summons under Section 7604(b) by an application for "attachment * * * as for a contempt." However, it is clear that the possibility of such an arrest [12] is in no sense a threat of such a penalty sufficient to bring the case within *Young*—indeed it is no penalty at all. The most that the courts can do if they find the defense to the summons unmeritorious in the judicial enforcement proceedings is to issue an order for compliance and commit the person until he complies.[13] Punishment for contempt may, of course, be avoided by compliance or by a stay of the order pending appellate review. Nor does the possibility of criminal prosecution under Section 7210 of the Code in any sense threaten penalties of such magnitude as to amount to a constitutional denial of judicial review. The person summoned cannot be prosecuted if he appears and asserts his defense. See *supra*, pp. 21–22. Even if he could be convicted for refusing to comply without a court order, conviction carries neither the cumulative penalties or ruinous fines necessary to bring a case within the doctrine of *Ex parte Young*. Here the maximum penalty is a fine of $1,000 or imprisonment for one year, or both.

[12] To our knowledge, there are four reported cases in which the "attachment" powers conferred in this section were utilized. *Sale* v. *United States*, 228 F. 2d 682 (C.A. 8); *Brownson* v. *United States*, 32 F. 2d 844 (C.A. 8); *Jarecki* v. *Whetstone*, 192 F. 2d 121 (C.A. 7); *Tucker* v. *Hubner*, 129 F. Supp. 110 (S.D. Calif.), remanded, 245 F. 2d 35 (C.A. 9).

[13] In *Brownson* v. *United States*, 32 F. 2d 844 (C.A. 8), and *Tucker* v. *Hubner*, 129 F. Supp. 110 (S.D. Calif.), remanded 245 F. 2d 35 (C.A. 9), the courts coupled a compliance order under Section 7604(b) with an order of commitment for civil contempt.

This point is graphically illustrated in *In re Turner*, 309 F. 2d 69 (C.A. 2). There, the taxpayer, claiming that production would violate rights guaranteed to him by the Fourth and Fifth Amendments, brought suit to quash or modify a summons which commanded him to produce all his personal records of income and expenses. On appeal from the denial of relief, the taxpayer argued that the records would necessarily fall within his privilege against self-incrimination and that the court should therefore intervene *in limine* to prevent what would be futile compulsion. The court of appeals, although recognizing the probability that many of the documents would be protected from disclosure by the privilege, affirmed the order of the district court directing the taxpayer "to submit to the relatively slight burden of bringing his records to the hearing and making there any claim of privilege that may be warranted in light of what develops" (*id.* at 72).

C. *The provisions of the Code are applicable, and constitutional as applied, to summonses seeking the books or papers of a third person*

In the present case, the summonses seek to obtain from Peat-Marwick books and papers which petitioners claim are held by Peat-Marwick for them and for their client Bromley. We submit that this circumstance does not affect the adequacy and exclusivity of the opportunities the Code provides for setting up any available defenses.

It is doubtful whether Peat-Marwick has any rights to resist enforcement either in this suit or in defense of its refusal to comply, for the challenge to the sum-

monses asserts not their rights but the rights of others. Assuming that Peat-Marwick has standing, upon the return of the summonses before the Special Agent and later, if necessary, upon the application for an order to show cause or attachment for contempt, it may assert all the reasons for withholding the documents that petitioners seek to assert in this proceeding.

Petitioners allege in their complaint that "enforcement and compliance with each purported 'Summons'" would constitute a violation of their client Bromley's privilege against self-incrimination and right to due process of law under the Fifth Amendment to the Constitution (R. 8–10). Again, it is hard to see how petitioners, who are not even in possession of the papers, can assert the constitutional privileges of Bromley in either this or any other proceeding but if they can, they have at least as good a right before the Special Agent and in any subsequent enforcement proceedings as they have here.

To put the point another way, even if we assume that the Commissioner would be denied relief by the district court in any future enforcement action on the ground that Bromley's rights and privileges would be infringed, this is only to say that petitioners would thereby have stated a valid defense to any such action. The mere commencement of such a suit by the Commissioner can in no sense amount to a violation either of Bromley's constitutional rights or his common-law privileges.

There remains the possibility that Peat-Marwick might voluntarily turn the papers over to the Commissioner instead of waiting for the return day, when both petitioners and Bromley would have a chance to be heard. One answer is that Peat-Marwick apparently has no intention of turning over the papers unless coerced by legal proceedings; Peat-Marwick did not admit the allegation of its intent (R. 110). A second answer is that anyone who entrusts his papers to another assumes the risk that the bailee will give them to another. Third, and most important, either petitioners or Bromley are free to bring an action against Peat-Marwick to compel Peat-Marwick to respect any rights the complainants have in the papers, subject only to Peat-Marwick's duty to comply with any valid court order enforcing the Commissioner's summonses. That would bar voluntary surrender and force a proceeding under the Code in which petitioners and Bromley could intervene and assert their respective rights.

Since the Code thus provides full opportunity to obtain a judicial ruling before any coercive sanctions are imposed, remitting all parties to the statutory procedure works no injustice and violates no constitutional rights.

Application of Colton, 291 F.2d 487 (C.A. 2), is contrary to our position whether the decision rested upon constitutional grounds as the citation of *Ex parte Young* seemed to suggest or upon some notion "inherent in the statutory scheme," as explained by

Judge Friendly in his subsequent opinion in *In re Turner*, 309 F. 2d 69, 72. Colton, an attorney—who had been subpoenaed to testify and produce papers pertaining to the tax liability of a client—had moved to quash the subpoena on the grounds that it called for information protected by the attorney-client privilege. The court, being of the view that the claim of privilege could not be tested in the course of enforcement proceedings without risking criminal penalties for disobedience under Section 7210 of the Code and possibly a contempt citation under Section 7604(b),[14] held that the action was against the Commissioner as an individual under the doctrine of *Ex parte Young*. We have stated above our reasons for concluding that the predicate of the decision was a mistaken understanding of Section 7210 and 7604(b). Unfortunately the government failed to explain in *Colton*, in either its brief or oral argument, that Section 7604(b) provides for enforcement only where the summons has been upheld after a hearing, and that neither Section 7604(b) nor Section 7210 sanctions punishment of one who responds to the summons in good faith but refuses to give evidence as a method of challenging its enforceibility. See *supra*, pp. 17–22.[15]

In Re Turner, 309 F. 2d 69, 72, which was written by the same judge, greatly weakens the authority of

[14] The court's statement regarding the scope of Section 7604 (b) is contrary to the First Circuit's interpretation of that section in *Brody v. United States*, 243 F. 2d 378, 381 (C.A. 1), certiorari denied, 354 U.S. 923. See, *supra*, n. 7.

[15] See also 75 Harv. L. Rev. 1222; 32 Fordham L. Rev. 147, 149.

Application of Colton, for Turner apparently could have made every argument about the danger of prosecution under section 7210 that was made by Colton. Nevertheless, the court held that Turner could not obtain an order quashing a summons upon the ground that the books, records and papers covered by the summons would fall within the privilege against self-incrimination; that defense, the court held, should be made upon return of the summons and in any enforcement proceeding.

II

SINCE THE COMMISSIONER ACTED WITHIN HIS STATUTORY AND CONSTITUTIONAL AUTHORITY, THE COMPLAINT SHOULD BE DISMISSED AS A SUIT AGAINST THE UNITED STATES WITHOUT ITS CONSENT

The statutory arrangement for the issuance and enforcement of administrative summonses in aid of the revenues cannot be circumvented by an action for an injunction against the Commissioner. The issuance of such a summons is part of the Commissioner's official duties. His action in the performance of such duties is the action of the United States. An action to bar him is an action against the United States which is barred by the doctrine of sovereign immunity as an unconsented suit.[16]

[16] As authority for the district court to hear their complaint, petitioners rely (R. 2) upon 28 U.S.C. 1340 (App., *infra*, p. 57), which grants to the district courts "original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue * * *." It is clear, however, that Section 1340 does not purport to be a consent to actions against the

A. This suit is barred by sovereign immunity because the relief sought would interfere with the public administration and would prevent the government from conducting an investigation authorized by the Internal Revenue Code

Whether a suit, although nominally directed against an individual officer, is in substance one against the United States is determined by "the essential nature and effect of the proceeding." *Ex parte New York*, 256 U.S. 490, 500, 502. Petitioners, in their complaint, do not purport to seek relief against respondent Caplin as an individual or private person. Rather, the complaint is directed against Caplin solely "in his capacity as Commissioner of Internal Revenue" (R. 3), and seeks to bind him in that capacity as well as his agents and successors in office (R. 14). The aim of the litigation is to protect the interests of the taxpayer Bromley from allegedly wrongful governmental action. Thus, the "essential nature" of the action is an attempt to restrain the Commissioner, in his official capacity, from enforcing the summonses.[17]

United States. *DeMasters* v. *Arend*, 313 F. 2d 79, 84 (C.A. 9), pending on petition for certiorari, No. 159, this Term; *First National Bank of Emlenton, Pa.* v. *United States*, 265 F. 2d 297, 299 (C.A. 3).

[17] The fact that petitioners also named Peat-Marwick as defendants—allegedly on the ground that the accounting firm would attempt to comply with the summonses so as not to risk attachment for contempt (R. 10, 40)—does not change the nature of the suit insofar as the immunity of the United States is concerned. Further, notwithstanding the request for an order enjoining Peat-Marwick from appearing or testifying or allowing examination of any records (R. 13), the action is essentially one for relief against the Commissioner. Thus, as the court of appeals observed, the "true position of [Peat-Marwick] is that of plaintiffs, although nominally they appear

In holding that such a suit is one against the United States to which it had not consented, the court below correctly applied the principles enunciated in *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, reaffirmed in *Malone* v. *Bowdoin*, 369 U.S. 643, and recently reiterated in *Dugan* v. *Rank*, 372 U.S. 609. The suit is against the sovereign if "the judgment sought would * * * interfere with the public administration" or if the effect of the judgment would be "to restrain the Government from acting, or to compel it to act" (*id.* at 620). The relief here, if granted, would clearly fall within both categories. It would restrain the Commissioner from enforcing the summonses in aid of his statutory duty under Section 7602 of the Code (App., *infra*, 56) to ascertain and collect the correct tax liability of Bromley and his numerous enterprises. It would mean that he could not move to compel the production of the documents sought by the summonses nor to elicit testimony from Peat-Marwick relating to Bromley's tax liability. To grant the relief would in short accomplish precisely what this Court said could not be done to the sovereign, without its consent: The government's investigation would be "stopped in its tracks." *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. at 704.

We reject, as without foundation, petitioners' suggestion (Br. 9, 12) that the doctrine of sovereign immunity applies only to cases which involve property in

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as defendants" (R. 161). This is clearly revealed by Peat-Marwick's answer, in which it contested the right of the government to compel enforcement of the summonses and joined with petitioners in their prayer for relief (R. 107–111).

the hands of a government official. The controlling consideration is not the subject matter of the suit, but the effect which granting the relief sought would have upon the sovereign. Where, as here, the relief sought would operate against the sovereign and interfere with the public administration, suits against government officials have frequently been held to be barred as suits against the United States, even though property was not involved.[18]

B. *This suit cannot be construed as one against the Commissioner as an individual*

We recognize, of course, that, (1) if the Commissioner exceeds his statutory authority or (2) if that authority or its exercise is constitutionally void, he may be sued as an individual without the defense of sovereign immunity.[19] Neither exception is applicable here.

(1) Petitioners claim that the Commissioner acted "outside" his statutory authority in issuing the summonses for an unauthorized purpose (Br. 12–13). Their contention, which was not spelled out in their

[18] See, *e.g.*, *Louisiana* v. *McAdoo*, 234 U.S. 627, 632 (setting tariff rates); *Rogers* v. *Skinner*, 201 F. 2d 521, 524 (C.A. 5) (official action of Regional Director of Wage-Hour Division); *Ainsworth* v. *Barn Ballroom Co.*, 157 F. 2d 97 (C.A. 4) ("off-limits" order of commander of military base); *Harper* v. *Jones*, 195 F. 2d 705 (C.A. 10) (same).

[19] A suit for specific relief may be maintained against a federal officer as an individual where the acts complained of are "not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void." *Larson* v. *Domes-*

complaint,[20] is that the summonses were not issued for the purpose of ascertaining their client's correct tax liability or for any other purpose authorized by Section 7602 of the Code. Rather, they argue that the Commissioner issued the summonses for the following (allegedly unlawful) purposes: (a) to procure their trial preparation for use in the then pending Tax Court litigation involving their client, Bromley; and (b) to obtain evidence which may be used in a possible criminal prosecution against Bromley. Were the questions here we would show that the Commissioner is empowered by Section 7602 to issue summonses for the purpose of obtaining information for use in connection with a pending Tax Court case.[21] *Norda Essential Oil & Chemical Co.* v. *United States*, 253 F. 2d 700 (C.A. 2); *Bolich* v. *Rubel*, 67 F. 2d 894 (C.A. 2). Nor is it a defense to a summons that the evidence might be ultimately used in a criminal proceeding.

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tic & Foreign Corp., 337 U.S. at 702; *Malone* v. *Bowdoin*, 369 U.S. at 647; *Dugan* v. *Rank*, 372 U.S. at 621–622.

[20] In their complaint, petitioners alleged (R. 7–8) that the summonses purport "to have been issued under color of authority of Section 7602 of the Internal Revenue Code of 1954" and that "[e]ach such purported 'Summons' is illegal on its face."

[21] The Tax Court cases involved Bromley's individual liabilities for the years 1953–1956 (R. 5, 17), whereas the summonses pertained only to Bromley's individual liabilities for the years 1957–1959 and corporate liabilities for the years 1953–1959 (R. 19–40). The trial of the Tax Court cases ended over sixteen months ago, and they are now awaiting decision. See Application for Stay of Mandate of Court of Appeals (p. 8), filed in this Court on March 20, 1963, and denied by the Chief Justice on March 23, 1963.

In re Magnus, Mabee & Reynard, Inc., 311 F. 2d 12, 14–17 (C.A. 2), certiorari denied, 370 U.S. 918; *In re Turner*, 309 F. 2d 69 (C.A. 2); *Lash* v. *Nighosian*, 273 F. 2d 185, 187–188 (C.A. 1), certiorari denied, 362 U.S. 904; *Boren* v. *Tucker*, 239 F. 2d 767, 772–773 (C.A. 9).[22]

But those questions are not to be decided here. Even if petitioner were right, the argument is merely that the Commissioner's action is based upon "an incorrect decision as to law" with respect to his powers of enforcement, and this is not enough to avoid the bar of sovereign immunity. *Larson* v. *Domestic & Foreign Corp.*, *supra*, at 695. Petitioner has not made, and could not make, the required "affirmative allegation of any relevant statutory limitation upon the [Commissioner's] powers" to issue summonses (*Malone* v. *Bowdoin*, 369 U.S. 643, 647). The Commissioner's authority is not merely to issue summonses that are in truth enforcible because they are ultimately found to conform to the statute and invade no constitutional or other legal privilege or immunity. The Commissioner is given power to act when he believes that a summons is proper and that the testimony or production of documents may be required. His authority to decide, and to act upon his decision, is not vitiated by proof that his decision, while bona

[22] *United States* v. *O'Connor*, 118 F. Supp. 248 (D. Mass.), upon which petitioners rely (Br. 34–35), is inapposite, for there the government admitted that a primary purpose of the summons was to support a criminal prosecution in which an indictment had already been returned. The *O'Connor* case has been so distinguished in *Boren* (239 F. 2d at 772–773), *Lash* (273 F. 2d at 188) and *Magnus* (311 F. 2d at 15).

fide, was erroneous. A claim of error in the exercise of the delegated power is not sufficient to render the Commissioner's action *ultra vires* for the power is to decide when to issue or not issue such summonses. See *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 689–690, 692–695. As the Court said in the *Larson* case (p. 695):

> [W]e have heretofore rejected the argument that official action is invalid if based upon an incorrect decision as to law or fact, if the officer making the decision was empowered to do so.

Any error by the Commissioner in issuing an improper summons may be corrected under the procedure provided by the Code.

DeMasters v. *Arend*, 313 F. 2d 79 (C.A. 9), pending on petition for certiorari, No. 159, this Term, decides nothing to the contrary. The court took as its premise the proposition that, "if appellants were indeed prohibited by Section 7605(b) or the Fourth Amendment from initiating this inquiry, a suit to restrain their unlawful conduct would not be barred by the doctrine of soverign immunity" (*id.* at 85). Section 7605(b) prohibits subjecting a taxpayer to "unnecessary examination or investigations" and permits only one inspection for each taxable year unless the Secretary finds a second to be necessary. The Ninth Circuit evidently assumed that those provisions operate as statutory limitations upon the Commissioner's power even to initiate an investigation, and the court then held that the Commissioner had complied with the provisions. We need not quarrel with

that assumption insofar as the instant case is concerned. Petitioners' objections to responding to the summonses rest upon altogether different grounds. The willingness of the Ninth Circuit to examine on its merits the claim of a violation of the Fourth Amendment seems inconsistent with our submission but since the court brushed the claim aside on its merits, the distinction upon the jurisdictional issue was hardly important. In any event, the case is not controlling here.

(2) There is no basis for a claim that the doctrine of sovereign immunity is inapplicable because the statute conferring upon the Commissioner the power to issue summonses is unconstitutional, or because he has exercised his power in an unconstitutional manner. In fact, petitioners do not directly attack the constitutionality of the sections of the Code which authorize the issuance of revenue summonses, enforcement thereof and penalties for refusal to comply (see 26 U.S.C. 7602, 7604, 7210; App., *infra*, pp. 55, 56–57). Nor does the complaint allege that the Commissioner has violated anyone's rights—constitutional or otherwise—by issuance of the summonses. If turning over the papers would invade Bromley's privilege against self-incrimination, the constitutional privilege can be asserted under the statutory procedure which is fully adequate for the protection of any right petitioners could assert in this proceeding.

C. Practical considerations of tax administration show the need for invoking the doctrine of sovereign immunity

The question presented by this case is not whether petitioners or their client Bromley shall be compelled

to turn over papers that are privileged or otherwise beyond the Commissioner's right to scrutinize. The question is whether the petitioners can stop the government in its tracks by an early, independent action instead of raising all proper objections at the hearing before the Special Agent upon return of the summonses and later, if necessary, as defenses to proceedings for enforcement. The admonition in *Decatur* v. *Paulding,* 14 Pet. 497, 516—that "the interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief"—applies with full force to premature interference with the initial phases of tax investigations.

First, it is axiomatic that a court will not assume jurisdiction unless there exists a justiciable "case or controversy" to be resolved. Where a person summoned appears in response thereto, and refuses to testify or produce documents on the ground that to do so would infringe certain rights and privileges, the Commissioner might well agree or conclude that the requested information is not sufficiently important to warrant further action. If so, that would be the end of the matter. An action to restrain enforcement of a summons, therefore, compels a court to take jurisdiction over a case that might never go to litigation if the complainant asserted his claims under the statutory procedure.

Second, assuming that the matter is serious enough to justify the commencement of a court proceeding, it is essential that the questions called for resolution be ripe for adjudication. Petitioners' action, commenced

before the Commissioner has had an opportunity in administrative proceedings to pose particular questions or request the production of specific documents, must inevitably prevent the development of the very factual basis which is needed to determine whether legal rights either exist or are threatened. *In re Turner, supra; Landy* v. *United States,* 283 F. 2d 303 (C.A. 5), certiorari denied, 365 U.S. 845; *Application of Burr,* 171 F. Supp. 448 (S.D. N.Y.). As the court below observed, the rights and privileges asserted by petitioners (and Peat-Marwick) with respect to the compulsion of these documents and such testimony "cannot definitely be known" "until these proceedings take form" (R. 160). This observation underscores the wisdom of the rule that a person summoned in investigative proceedings cannot ask courts to intervene *in limine,* but must first appear, bring the documents "into the presence of [the interrogator] (i.e., stop short of inspection) * * *," and then assert his privileges and objections as particular questions are asked and specific documents are requested. *Chapman* v. *Goodman,* 219 F. 2d 802, 806 (C.A. 9); *In re Turner,* 309 F. 2d at 71–72. See also *Rogers* v. *United States,* 340 U.S. 367, 374; *Hoffman* v. *United States,* 341 U.S. 479, 486–487; VIII Wigmore, *Evidence,* Sec. 2268, pp. 405–406 (McNaughton rev. 1961).

Petitioners' injunction suit, like any suit to quash a summons, wastes time and unnecessarily burdens the courts as well as the executive. Generally, the entertainment of a suit to enjoin enforcement of or to quash a revenue summons adds an extra round of trial and appellate proceedings to those otherwise

required in the enforcement process. Thus, the question raised by petitioners' suit is solely whether Peat-Marwick can be summoned to testify or produce documents in the first instance. If this broad question were decided affirmatively, it would not resolve any of the potential objections to answering specific questions or producing particular documents which may become the subject of later enforcement proceedings. The ensuing delay in the public administration of the tax laws may be measured in terms of years, as is shown by the subsequent history of the *Colton* case (201 F. Supp. 13 (S.D.N.Y.), affirmed 306 F. 2d 633 (C.A. 2), certiorari denied, 371 U.S. 951) and the dreary pattern of dilatory litigation and delays spawned thereby. See, *e.g., In re Magnus, Mabee & Reynard, Inc.*, 311 F. 2d 12 (C.A. 2), certiorari denied, 370 U.S. 918; *In re Turner, supra.*[23] These delays and fragmented proceedings are avoided by application of the doctrine of sovereign immunity which leaves the summoned parties to pursue the prescribed administrative process with appeal to the courts available therefrom.

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[23] An egregious example of the resulting appalling waste of judicial time and energy is *In Re Magnus, Mabee & Reynard, Inc., supra*, where two full rounds of appeal and certiorari proceedings occurred, halting a tax investigation for about two years. As the Second Circuit there observed (311 F. 2d at 13–14):

> This is the second time these summonses have been before this court on a motion to quash. The first attack on the summonses was made by the taxpayers who moved to quash the summonses on June 29, 1961. Their application was denied by Judge Dimock on July 14, 1961, and reargument was denied (D.C., 196 F. Supp. 127). The tax-

We shall now show in more detail that the denial of jurisdiction works no significant hardship or injustice upon the petitioners who have a fully adequate remedy at law in the course of judicial enforcement proceedings to protect their alleged rights and those of their client to nondisclosure of the documents.

III

SINCE PETITIONERS' RIGHTS MAY BE ASSERTED IN DEFENSE OF ANY PROCEEDING TO ENFORCE THE SUMMONSES OR PUNISH VIOLATION, THE COMPLAINT SHOULD BE DISMISSED FOR WANT OF EQUITY

It is fundamental that the "basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Beacon Theatres* v. *Westover*, 359 U.S. 500, 506–507. To justify the grant of such relief, "the complainant's need of it, and the absence of an adequate remedy at law, must clearly appear." *Douglas* v. *Jeannette*, 319 U.S. 157; *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U.S. 151,

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payers appealed. The decision below was affirmed in an opinion by this Court on February 13, 1962. (2 Cir., 299 F. 2d 335). Petitions for rehearing and rehearing *in banc* were denied. A stay was granted on April 4, 1962, by Mr. Justice Harlan pending application for a writ of certiorari. On April 10, 1962, ten months after the summonses were originally issued, an indictment was filed charging Percy Magnus with tax evasion and failure to file returns. Thereafter, certiorari was denied by the Supreme Court on June 11, 1962 (370 U.S. 918, 82 S. Ct. 1556, 8 L. Ed. 2d 499). The corporation then sought on July 17, 1962, to stay enforcement and quash the summons directed to it, and the taxpayer Percy C. Magnus sought similar relief against the summons directed to the accountants. Both applications were denied in an opinion by Judge Dimock on September 19, 1962, and it is this ruling that is the subject of this appeal.

162. In our view, these well established propositions are a complete bar—independent of the government's sovereign immunity—to this action.

Petitioners urge (Br. 20–21) that they are entitled to relief because (1) Peat-Marwick "intended to comply with the subpoena, thus obviating any further enforcement action by respondent-Commissioner"; and (2) "even had there been refusal and subsequent enforcement action, no hearing or remedy would have been assured under Sec. 7604 without clear and present danger of arrest and attachment * * * [and] [i]n an extreme case even criminal proceedings under Sec. 7210 might have been brought."

As to the first ground, it is far from clear that Peat-Marwick would comply with the summonses; moreover, if there were a real threat of such compliance, petitioners could fully protect themselves by suing Peat-Marwick to enjoin it from complying unless and until ordered to do so by a court of competent jurisdiction. The relevancy of the second point is unclear. If it is merely an additional reason why Peat-Marwick would be likely to comply, our answers to the first ground are dispositive. If, on the other hand, petitioners are suggesting that they may enjoin enforcement of the summonses because of the threat of criminal prosecution of Peat-Marwick if the latter fails to comply, the short answer is that this is a claim which may be made only by Peat-Marwick and not by petitioners. For it is axiomatic that one may sue to protect only one's own rights, and not the rights of third persons. Finally, we shall show that, even if

it be assumed that petitioners, because of their relationship with Peat-Marwick, may assert the latter's rights as a basis for injunctive relief, the remote possibility that penalties might be imposed upon Peat-Marwick for its refusal to comply does not warrant the exercise of equity jurisdiction to enjoin enforcement of the summonses.

A. *The possibility that Peat-Marwick may attempt to comply with the summonses does not afford a basis for jurisdiction of this suit to enjoin their enforcement*

Petitioners assert in their complaint (R. 10) that the intention of Peat-Marwick to attempt to comply with the summonses prior to any enforcement proceedings threatens them with irreparable harm in that the Commissioner would appropriate their trial preparation for use in the then pending Tax Court litigation involving their client Bromley, and would otherwise use this information in violation of Bromley's constitutional rights. We submit that petitioners' remedies at law are adequate to protect their rights and that these allegations do not warrant the intervention of a federal court of equity.

In the first place, at the time of the district court's dismissal of the complaint the pleadings did not, as petitioners assert (Br. 5), contain an unqualified allegation that Peat-Marwick had expressed an intention to comply with the summonses. Peat-Marwick is, as the court below pointed out (R. 161), although nominally a party defendant, in reality on the same side as petitioners themselves. Peat-Marwick's answer (R. 107–111) admitted all but one of the allega-

tions of the complaint; and it joined in petitioners' prayer that the Commissioner be enjoined from instituting enforcement and that Peat-Marwick, itself, be enjoined from compliance. It is true that petitioners alleged, upon information and belief, that Peat-Marwick would attempt to comply with the summonses unless compliance and enforcement were stayed by court order (R. 10). But Peat-Marwick's answer carefully avoided any admission of this allegation. It did not admit that it had *informed* petitioners that it would comply in the absence of a court order. And it did not admit that is *would* comply. It simply stated that "*if* the mentioned Summonses are complied with and will have to be complied with, * * * [Peat-Marwick] will be called upon to deliver up" documents belonging to petitioners which could compromise their preparation for trial of the Tax Court cases (R. 110, emphasis supplied). This is far from an admission that there will be voluntary compliance; in fact, the implication of the phrase "will have to be complied with" is that Peat-Marwick will *not* comply unless compelled by court order. Where petitioners and Peat-Marwick seek identical equitable relief, where petitioners have alleged that Peat-Marwick is their employee (R. 5–6, Br. 36),[24] and where Peat-Marwick fails to support the allegation of compliance, we submit that no clear showing has been made of a need for equitable relief and that substantial justice

[24] Indeed, for purposes of their position on the merits, petitioners represent that Peat-Marwick "worked for [them] just as if they were their own employees; clerks or stenographers working in their own offices." (R. 116; Br. 36.)

would be done by dismissal of the complaint for want of equity. *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U.S. 151.

Furthermore, even if the allegation as to voluntary compliance by Peat-Marwick be taken at face value, petitioners would still not be entitled to relief against the Commissioner. Petitioners could have adequately protected their rights without resorting to an action against the Commissioner of Internal Revenue by a simple action for an injunction against Peat-Marwick to prevent compliance with the summonses until so ordered by a court of competent jurisdiction. *Federal Trade Commission* v. *St. Regis Paper Co.*, 304 F. 2d 731 (C.A. 7). Further, in our view, such an order would eliminate for Peat-Marwick any risk that a refusal to comply might be regarded as evidence of bad faith warranting an application for attachment under Section 7604(b) or prosecution under Section 7210.

Finally, when they turned over the documents to Peat-Marwick, petitioners, at least to some degree, assumed the risk that their agent might, contrary to their instructions, choose to disclose them in response to a revenue summons.

B. *The remote possibility that Peat-Marwick may be subjected to penalties if it fails to comply with the summonses does not warrant the exercise of equity jurisdiction to enjoin enforcement at petitioners' suit.*

(1) The summonses are directed solely to Peat-Marwick, and it is only the latter, and not petitioners, who could possibly be subject to any penalties for noncompliance. While Peat-Marwick's answer to the

complaint joined in petitioners' prayer for relief, and while Peat-Marwick's interests may be closely aligned with petitioners', petitioners' argument in this Court is that the enforcement proceedings would provide an inadequate forum in which to test the validity of the summonses because of the possible penalties for noncompliance to which Peat-Marwick might be subjected if the summonses are upheld. In short, petitioners are attempting to invoke the aid of a court of equity because of an alleged threat of irreparable injury not to themselves, but to someone else, *i.e.*, the possibility that Peat-Marwick might not have an adequate opportunity to test the summonses in the enforcement proceedings. It is axiomatic, however, that a litigant may assert only his own rights, and not those of another. Petitioners have shown no basis for invoking equity jurisdiction, since they have failed to show that any rights *they* may have to contest the summonses could not be adequately protected in the proceedings before the Special Agent and, if necessary, in the enforcement proceedings in the courts.

We think that this is a complete answer to petitioners' contention that the enforcement proceedings would not provide an adequate opportunity for them to test the summonses. But since petitioners may be suggesting that their relationship with Peat-Marwick somehow entitles them to assert the latter's rights as a basis for equitable relief, we now show that in any event the possibility that Peat-Marwick may be subjected to penalties for non-compliance is so remote that it cannot form the basis for equitable relief.

(2) Petitioners argue that Peat-Marwick is unable to test out its objections to the Commissioner's summonses under this statutory framework without running the risk of arrest and attachment, and even possibly criminal proceedings under Section 7210, if the summonses are upheld. We have shown already that Section 7210, properly construed, will not support a prosecution against one who appears in response to a summons and asserts his objections. In that event an application for enforcement is the only sanction. See *supra*, pp. 17–22. In addition, a close examination of the statutory provisions and their administration by the Commissioner[25] shows that the practical risks of a refusal to comply are nil, provided Peat-Marwick appears in response to the summonses and claims its defenses. The possibility of an "arrest" if the Commissioner proceeds under the seldom used procedures of Section 7604(b) is not the threat of irreparable harm sufficient to warrant the intervention of a court of equity. Any fear of a contempt order or

[25] As set forth (*supra*, pp. 16–22), the statutory scheme for issuance and enforcement of a revenue summons is as follows: The Commissioner may issue summonses for stated purposes (Section 7602). Persons summoned to appear before the Commissioner may at that time raise all legal and constitutional objections to questions asked or the production of requested documents. In the event the Commissioner rejects the grounds of objection he must move in the federal district courts for an order compelling compliance under Sections 7402(b), 7604(a) or 7604(b). Prior to the issuance of such an order, the party summoned is afforded a full hearing upon his objections. Consistent with the law of contempts, failure to comply with such an order may be punished as a criminal or civil contempt. Finally, Section 7210 authorizes criminal prosecution of a person who fails to appear in response to the summons.

a criminal prosecution is more imaginary than real. Assuming petitioners may assert Peat-Marwick's rights, they would have an entirely adequate remedy at law as an intervenor in the Commissioner's enforcement action against Peat-Marwick. Moreover, even if it be conceded that Section 7210 presents the *possibility* of prosecution despite the invocation of a privilege in good faith,[26] a court of equity will not intervene where the party concerned has an adequate remedy at law by way of a defense to the criminal action. *In re Sawyer*, 124 U.S. 200; *Truax* v. *Raich*, 239 U.S. 33.[27] This rule has been applied even where the criminal statute is alleged to be unconstitutional. *Spielman*

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[26] We refer to the fact that the party summoned would still bear the risk that the Commissioner and the responsible officials in the Department of Justice might later take the view that the assertion of privilege was not, in fact, in good faith, and therefore initiate criminal proceedings.

[27] Cf. *Federal Power Comm'n* v. *Edison Co.*, 304 U.S. 375, 383, 386–387 (order of Federal Power Commission to produce books and records not reviewable in court of appeals since it is only preliminary in nature; to authorize review of such an order would afford "opportunity for constant delays in the course of the administrative proceeding * * *"; respondents deemed to have "full opportunity to contest" the validity of the order during enforcement proceedings or in a defense to a criminal prosecution wherein the "qualification that the refusal must be 'willful' fully protects one whose refusal is made in good faith * * *"). Compare the decision in *Federal Trade Commission* v. *Millers' Nat. Federation*, 23 F. 2d 968, 972 (C.A. D.C.) with the later decision in the same case at 47 F. 2d 428, 429–430 (C.A. D.C.). See also *Pauling* v. *Eastland*, 288 F. 2d 126, 130 (C.A. D.C.), certiorari denied, 364 U.S. 900 (federal court is without jurisdiction to enjoin enforcement of order of Senate Subcommittee to produce certain documents; proper time to pass on validity of such an order is on appeal from a conviction for failure to comply).

Motor Co. v. *Dodge*, 295 U.S. 89, 95; *Watson* v. *Buck*, 313 U.S. 387, 401; *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 98–99.

In the instant case, it is clear that Peat-Marwick—even if it chose to engage in a course of conduct which approached a violation of the criminal statute—would incur no risk of financial loss by way of ruinous or severe penalties. This is a *fortiori* true of petitioners who run no risk whatever.

The short of it is that if and when the Commissioner seeks enforcement of the summonses here involved, Peat-Marwick (and petitioners claiming through them) will have ample opportunity to test the validity of their claims without irreparable harm. When one considers the resulting delay, unnecessary burdens upon the courts and disruption in the administration of the revenue laws, the virtually nonexistent risks incident to such a test shrink still smaller as an alleged basis for equity jurisdiction.

IV

ASSUMING THAT THE PRESENT ACTION IS HELD TO BE MAINTAINABLE, IT SHOULD BE REMANDED TO THE DISTRICT COURT FOR FURTHER DEVELOPMENT OF PETITIONERS' FACTUAL CONTENTIONS

If this Court should hold that the present action is maintainable, we agree with petitioners (Br. 38–39) that the case should be remanded to the district court for a hearing on the merits of their complaint for a permanent injunction. Since in such circumstances the Commissioner would continue to refrain from instituting an enforcement action pending disposition

of the case on remand,[28] there would be no occasion for further action upon petitioners' request for a preliminary injunction.[29]

Apart from the question whether this suit is maintainable at all, the only other issues before the Court are whether the district court correctly dismissed the complaint on the grounds that petitioners had no "standing to sue" and had "failed to state a cause of action upon which relief can be granted" (R. 149).

In holding that petitioners had no standing to sue, the district court apparently took the view that petitioners had failed to allege a sufficient property interest in the documents covered by the summonses. While there is some basis for such a holding (see

[28] Although the Chief Justice, on March 23, 1963, refused petitioners' request to stay the enforcement of the summonses pending the filing of a petition for a writ of certiorari, the Commissioner has voluntarily refrained from such action during the pendency of the litigation.

[29] In this connection, the history of this case graphically demonstrates the delays and disruption of the administration of the revenue laws which would result if jurisdiction of such equity actions were upheld. Petitioners have now forestalled the government's investigation for almost two and one-half years. The summonses were served upon Peat-Marwick on June 13, 1961. This has rendered substantially moot any issue relating to the government's alleged effort to obtain the results of petitioners' preparations for the trial of the Tax Court cases. This trial ended some 16 months ago and is now awaiting decision. Moreover, the running of the six-year statute of limitations for criminal purposes may yet result in mooting another of petitioners' objections—that the information was allegedly sought for purposes of making a criminal case against the taxpayer, Bromley. Section 6531, Internal Revenue Code of 1954. The fact remains that the Internal Revenue Service has to date been unable to ascertain the correct tax liability of Bromley and his numerous organizations.

statement, *supra*, p. 6), we believe that the allegations of petitioners' complaint and accompanying affidavit (R. 6, 44) are sufficient to support their contention that the documents involved rightfully belonged to them, or to their client, Bromley, and were being held by Peat-Marwick only in its capacity as petitioners' employee. Moreover, since Peat-Marwick's position, as pointed out by the court of appeals, is in reality that of a plaintiff seeking the same relief as petitioners (R. 161), we think it apparent that the pleadings, as so construed, allege the requisite property interest in the summoned documents to satisfy the requirement of standing.

It further appears that, if our objections based upon sovereign immunity and the adequacy of the statutory remedy are overruled, the allegations of petitioners' complaint are sufficient to state a cause of action which—if proved—would entitle them to relief. Thus, allegations, such as those made by petitioners (R. 9, 43), that documents have been summoned for an improper purpose and are in any event protected by the attorney-client privilege have been upheld as grounds for nonproduction. See, *e.g.*, *United States* v. *O'Connor*, 118 F. Supp. 248 (D. Mass.); *Commissioner* v. *Schwarz*, 247 F. 2d 70 (C.A. D.C.). But at the hearing on petitioners' motion for a preliminary injunction and on the government's motion to dismiss the complaint, no testimony was offered, either by petitioners, Peat-Marwick, or the client Bromley, with respect to these issues. Whether the documents involved in fact contained confidential communications

by the client Bromley (Pet. Br. 36) or whether they reflected petitioners' "mental impressions and ideas" under the rationale of the work product rule, can be determined only after a hearing (Br. 37–38).[30]

[30] For the sake of clarity, we point out that petitioners err in their contention (Br. 24) that the summonses also sought the individual records of the taxpayer Bromley. Petitioners devote much argument (Br. 25–31) to the proposition that such records are protected by the Fifth Amendment even in the hands of Peat-Marwick. This is not an issue in the case, since the summonses in fact do not seek the personal records of Bromley, but only of certain domestic and foreign corporations (R. 19–40). It is true, as petitioners contend (Br. 35), that there is authority for the proposition that the Fifth Amendment protects against the production of books of a foreign corporation which are held "in a purely personal capacity." *Application of Daniels*, 140 F. Supp. 322, 326–328 (S.D. N.Y.). Whether these records were so held by Bromley would be a proper question for exploration on remand.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed. But if the Court should hold that the present action is maintainable, the case should be remanded to the district court for a hearing on the merits of petitioners' complaint for a permanent injunction.

Respectfully submitted,

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NOVEMBER 1963.

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C., 1958 ed.):

SEC. 7210. FAILURE TO OBEY SUMMONS.

Any person who, being duly summoned to appear to testify, or to appear and produce books, accounts, records, memoranda, or other papers, as required under sections 6420(e)(2), 6421(f)(2), 7602, 7603, and 7604(b), neglects to appear or to produce such books, accounts, records, memoranda, or other papers, shall, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with costs of prosecution.

* * * * *

SEC. 7402. JURISDICTION OF DISTRICT COURTS.

* * * * *

(b) *To Enforce Summons.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

* * * * *

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) *Tax.*—Except as provided in sections 6212 (a) and (c), and 6213 (a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

* * * * *

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

* * * * *

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) Jurisdiction of district court.

If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such

attendance, testimony, or production of books, papers, records, or other data.

(b). Enforcement.

Whenever any person summoned under sections 6420(e)(2), 6421(f)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

Title 28 United States Code:

SEC. 1340. INTERNAL REVENUE; CUSTOMS DUTIES.

The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court.

* * * * *

SEC. 2201. CREATION OF REMEDY.

In a case of actual controversy within its jurisdiction, except with respect to Federal

taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

U. S. GOVERNMENT PRINTING OFFICE: 1969